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CHALLENGING NPDES PERMITS GRANTED WITHOUT PUBLIC PARTICIPATION

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Abstract: Efforts to enhance water quality include citizen oversight of the development of effluent limitations set forth in National Pollutant Discharge Elimination System permits. Because concentrated animal feeding operations (CAFOs) generate considerable manure that may be associated with water pollution, environmental groups have challenged EPA's regulations, including the absence of a right to participate in the development of effluent limitations. Without public input, there is a restricted dialogue on alternatives and fewer opportunities for enforcement actions. Revised regulations covering discharges from CAFOs contain new requirements for permit applicants. Before the authorization of any discharge by a permitting authority, the public must have an opportunity to evaluate the effluent standards. A review of several cases suggests that the participation requirements apply not only to new discharges, but also modifications to discharges in existing permits. The regulations and cases suggest that citizens can be even more active in championing environmental quality.

Introduction

To foster a more robust democracy, Congress granted citizens opportunities to participate in establishing environmental regulations and ensuring their enforcement. There are significant public participation requirements at three stages. First, when an agency adopts new regulations, the public has a right to be involved.[1] Individuals, business entities, and groups can present data and push for the adoption of regulations to address perceived problems.[2] The second major stage of public

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[1] *See* 5 U.S.C. § 553(c) (2006) (setting forth parameters for public participation in rulemaking under the Administrative Procedure Act).

[2] *Id.* § 553(e); *see, e.g.*, Timothy Riley, Note, *Piercing the Regulatory Veil: The Need to Expand Federal Clean Water Act NPDES Permit Coverage to Include Municipal "Satellite" Sewer Collection Systems*, 26 Va. Envtl. L.J. 615, 615–17 (2008) (advocating greater regulation of satellite sewer collection systems).

involvement occurs when agencies issue permits; requirements command that the public has an opportunity to be involved in reviewing permit applications.[3] Third, many federal environmental statutes allow citizens to bring suits to enforce laws or to compel action by federal agencies.[4] Citizen suits allow successful plaintiffs to be awarded attorney fees.[5] Citizen suit provisions have been employed to address environmental violations and enhance governmental enforcement.[6]

Dissatisfaction with the quality of our environment has led citizen groups to become active participants in all three of these opportunities for public involvement, and citizen suits have been important in achieving the goals of environmental legislation.[7] However, citizen suits are limited by the statutory grant, requirements of injury, and redressability.[8] Moreover, citizen suits generally are not possible if a government is already diligently prosecuting an action.[9] Courts have interpreted fed-

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[3] *See, e.g.*, 33 U.S.C. § 1251(e) (2006) (mandating public participation in developing and enforcing effluent limitations, which are set forth by permits).

[4] *See* 15 U.S.C. § 2619(a) (2006) (Toxic Substances Control Act); 16 U.S.C. § 1540(g) (2006) (Endangered Species Act); 33 U.S.C. § 1365(a) (2006) (Clean Water Act); 33 U.S.C. § 1415(g)(1) (2006) (Marine Protection, Research and Sanctuaries Act); 42 U.S.C. § 300j-8(a) (2006) (Safe Drinking Water Act); 42 U.S.C. § 6972(a) (2006) (Resource Conservation and Recovery Act); 42 U.S.C. § 7604(a) (2006) (Clean Air Act); 42 U.S.C. § 9659(a) (2006) (Comprehensive Environmental Response, Compensation, and Liability Act); 42 U.S.C. § 11046(a) (2006) (Emergency Planning and Community Right-to-Know Act).

[5] *See, e.g.*, 33 U.S.C. § 1365(d) (granting attorney's fees for citizen suits under the Clean Water Act); 42 U.S.C. § 300j-8(d) (granting attorney's fees under the Safe Drinking Water Act); *see also* Matthew Burrows, Note, *The Clean Air Act: Citizen Suits, Attorneys' Fees, and the Separate Public Interest Requirement*, 36 B.C. ENVTL. AFF. L. REV. 103, 117–18 (2009) (discussing the requirement of success on the merits of a lawsuit before awards of attorney's fees are appropriate).

[6] *See* Alberto B. Lopez, Laidlaw *and the Clean Water Act: Standing in the Bermuda Triangle of Injury in Fact, Environmental Harm, and "Mere" Permit Exceedances*, 69 U. CIN. L. REV. 159, 160 (2000) (advancing the idea that citizen suits spur governmental enforcement); Janet V. Siegel, *Negotiating for Environmental Justice: Turning Polluters into "Good Neighbors" Through Collaborative Bargaining*, 10 N.Y.U. ENVTL. L.J. 147, 164 (2002) (noting some successful use of citizen suits by low-income communities to secure relief from unlawful pollution); Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 84 (2002) (advancing the idea that citizen suit provisions can encourage vigorous enforcement efforts).

[7] *See* Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENVTL. AFF. L. REV. 263, 275–77 (1999).

[8] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 562–63, 568 (1992) (dismissing a citizen suit due to lack of standing due to inadequate injury and redressability).

[9] *See, e.g.*, 15 U.S.C. § 2619(b)(1)(B); 33 U.S.C. § 1415(g)(2); 42 U.S.C. § 300j-8(b)(1)(B); 42 U.S.C. § 6972(b)(1)(B); 42 U.S.C. § 7604(b)(1)(B); 42 U.S.C. § 11046(e).

eral law to further limit citizen suits via standing or deferring to decisions by the regulatory authority.[10]

This Article addresses opportunities for citizen involvement in the issuance of National Pollutant Discharge Elimination System (NPDES) permits, and the use of citizen suits to compel regulatory authorities to provide requisite opportunity for input. Congressional directives in section 101 of the Clean Water Act (CWA),[11] and their application to the permitting of discharges from concentrated animal feeding operations (CAFOs), provide opportunities for enhanced citizen input. Failure to allow the public to participate in the CWA's permitting process has led to citizen suit challenges. Citizen participation in the regulation of CAFOs under the CWA provides informative examples of the benefits of public involvement at multiple stages of environmental regulation.[12]

CAFOs are listed as point sources under the CWA and therefore need to secure NPDES permits before they can discharge pollutants into waters of the United States.[13] Although CAFOs are defined by CWA regulations, disdain for CAFO operations is not solely premised on water pollution. The public is also concerned about the humaneness of raising animals at concentrated facilities,[14] the demise of family farms,[15] the overuse of antibiotics,[16] and air pollution from large con-

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[10] *See, e.g.*, *Lujan*, 504 U.S. at 578 (finding that citizens lack standing to bring suit); Ark. Wildlife Fed'n v. ICI Americas, Inc., 29 F.3d 376, 381 (8th Cir. 1994) (finding that comparable state public participation provisions were sufficient even if they did not allow the same participation as available under federal law); N. & S. Rivers Watershed Ass'n v. Town of Scituate, 949 F.2d 552, 557 (1st Cir. 1991) (deferring to a state agency's actions in enforcing discharge limitations under the Clean Water Act).

[11] *See* 33 U.S.C. § 1251 (2006) (stating purpose of the Act and delineating participation requirements).

[12] *See* Ayako Sato, Note, *Public Participation and Access to Clean Water: An Analysis of the CAFO Rule*, Sustainable Dev. L. & Pol'y, Winter 2005, at 40, 43.

[13] *See* 40 C.F.R. § 412.1 (2010); *see also* 33 U.S.C. §§ 1311(a), 1342, 1362(14) (defining point source and precluding discharges of pollutants except as authorized).

[14] *See, e.g.*, Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 Law & Contemp. Probs. 325, 344 (2007) (advocating alternative production methods to eliminate sow gestation crates and battery cages for chickens); Lars Johnson, Note, *Pushing NEPA's Boundaries: Using NEPA to Improve the Relationship Between Animal Law and Environmental Law*, 17 N.Y.U. Envtl. L.J. 1367, 1407–08 (2009) (suggesting use of NEPA to challenge the inhumane treatment of animals at CAFOs).

[15] *See, e.g.*, Kate Celender, Note, *The Impact of Feedlot Waste on Water Pollution Under the National Pollutant Discharge Elimination System (NPDES)*, 33 Wm. & Mary Envtl. L. & Pol'y Rev. 947, 960 (2009) (claiming that CAFOs can lead to the demise of family farms); Johnson, *supra* note 14, at 1408 (claiming that "CAFOs threaten the existence of family farms"); Ryan Alan Mohr, Note, Waterkeeper Alliance v. EPA: *A Demonstration in Regulating the Regulators*, 10 Great Plains Nat. Resources J. 17, 17–18 (2006) (noting that CAFOs keep getting larger and displacing family farms).

centrations of animals.[17] The animosity against CAFOs may stem from one or more of these issues, and the negative externalities associated with the production of food animals at CAFOs provides arguments for regulating their activities. Efforts to assist family farms have lead some environmentalists to argue that if CAFOs had to internalize pollution costs accompanying the production of animals, they would not be any more economically efficient than traditional farms.[18]

CAFOs have been regulated by the Environmental Protection Agency (EPA) under a CAFO Rule since the 1970s,[19] and the federal regulations governing their discharges have been successively challenged since the early 1990s.[20] The EPA responded to a judicial order by enacting a revised CAFO Rule in 2003.[21] Environmental and agricultural interest groups immediately challenged selected provisions of the 2003 CAFO Rule in *Waterkeeper Alliance, Inc. v. United States EPA*.[22]

The Second Circuit Court of Appeals issued the *Waterkeeper* decision, which addressed petitioners concerns and required the EPA to develop yet another revised rule.[23] One of the major issues addressed

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[16] *See generally* Terence J. Centner, *Regulating the Use of Non-Therapeutic Antibiotics in Food Animals*, 21 GEO. INT'L ENVTL. L. REV. 1 (2008) (discussing the adoption of a precautionary principle to safeguard human health by limiting the use of non-therapeutic antibiotics in food animals).

[17] *See, e.g.*, Jody M. Endres & Margaret Rosso Grossman, *Air Emissions from Animal Feeding Operations: Can State Rules Help?*, 13 PENN ST. ENVTL. L. REV. 1, 1–51 (2004) (surveying state law to discern measures to govern air emissions from livestock facilities); K.M. Thu, *Public Health Concerns for Neighbors of Large-Scale Swine Production Operations*, 8 J. AGRIC. SAFETY & HEALTH 175, 176–82 (2002) (reviewing research related to health issues for persons exposed to emissions from large swine production facilities); Mariel Kusano, Note, *Rewarding Bad Behavior: EPA's Regime of Industry Self-Regulation*, 12 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 167, 169–71 (2006) (discussing the hazards of air pollutants from animal production).

[18] *See, e.g.*, Susan M. Brehm, *From Red Barn to Facility: Changing Environmental Liability to Fit the Changing Structure of Livestock Production*, 93 CALIF. L. REV. 797, 814–15 (2005) (discussing large-scale animal production).

[19] Concentrated Animal Feeding Operations, 41 Fed. Reg. 11458 (Mar. 18, 1976) (codified as amended at 40 C.F.R. pts. 124, 125); Effluent Limitations Guidelines, 39 Fed. Reg. 5704 (Feb. 14, 1974) (codified as amended at 40 C.F.R. pt. 412); *see also* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7176 (Feb. 12, 2003) (codified at 40 C.F.R. pts. 122, 412) [hereinafter Preamble to the 2003 CAFO Rule].

[20] *See, e.g.*, Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 115–16 (2d Cir. 1994).

[21] Preamble to the 2003 CAFO Rule, *supra* note 19, at 7179 (acknowledging the 1974 and 1976 regulations).

[22] 399 F.3d 486, 497 (2d Cir. 2005).

[23] *See id.* at 524.

by the *Waterkeeper* court was the ability of the public to participate in the development of applicants' nutrient management plans set forth in NPDES permits.[24] The court found that the 2003 CAFO Rule violated section 101 of the CWA's public participation requirements, because it allowed permitting authorities to approve NPDES permits without revealing the particulars of nutrient management plans, and vacated that portion of the 2003 CAFO Rule.[25]

Similarly, *Sierra Club Mackinac Chapter v. Department of Environmental Quality*, involved a challenge to the public participation opportunities provided in a state-administered NPDES permitting program.[26] Michigan's approval process for discharges under general permits failed to allow the public to participate in developing and revising CAFOs' nutrient management plans.[27] The court noted that allowing concerned citizens access to nutrient management plans through a Freedom of Information Act request did not provide the public "meaningful review during its development."[28] Michigan's permit program was found to be deficient because it did not provide public participation as required by federal statutory requirements.[29]

In 2008, the EPA adopted a revised CAFO Rule that responded to the shortcomings of the 2003 Rule.[30] However, agricultural interest groups claim provisions of this rule are contrary to the congressional dictates of the CWA, and have challenged the 2008 CAFO Rule in the Fifth Circuit.[31] Litigation over the 2008 CAFO Rule highlights the difficulty in devising regulations that comply with federal law without going too far.[32]

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[24] *Id.* at 503–04, 524 (citing 33 U.S.C. § 1251(e) (2006)).

[25] *Id.*

[26] 747 N.W.2d 321, 334–35 (Mich. Ct. App. 2008) (challenging public participation under Michigan's CAFO regulations); *see* Terence J. Centner, *Courts and the EPA Interpret NPDES General Permit Requirements for CAFOs*, 38 ENVTL. L. 1215, 1228–29 (2008) (analyzing the *Sierra Club Mackinac Chapter* case, including the issue of inadequate public participation).

[27] *Sierra Club Mackinac Chapter*, 747 N.W.2d at 334–35.

[28] *Id.* at 335.

[29] *Id.*

[30] *See* Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision, 73 Fed. Reg. 70,418 (Nov. 20, 2008) [hereinafter Preamble to the 2008 CAFO Rule] (codified at 40 C.F.R. pts. 9, 122, 412).

[31] *See generally* Opening Brief of Petitioners at 28, Nat'l Pork Producers Council v. EPA, No. 08–61093, (5th Cir. Dec. 7, 2009) [hereinafter Pork Producers Brief] (challenging the 2008 CAFO Rule as exceeding EPA's authority).

[32] *See, e.g.*, Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 497–524 (2d Cir. 2005); Pork Producers Brief, *supra* note 31, at 37–86.

This Article addresses public participation and citizen suits to portend that environmentalists have a potent weapon to garner further compliance with NPDES permitting provisions of federal environmental statutes. Part One briefly addresses concerns about water pollution from CAFOs. Evidence suggests large animal producers may overapply manure to fields, which leads to nutrient pollution of waters of the United States. The EPA has struggled to meaningfully address the pollutants entering surface waters from the land application of manure.[33] Part Two summarizes participation under the CWA and the intent of Congress in delineating citizen input requirements for the NPDES permitting process. The Act is explicit in commanding opportunities for public input in processes regulating discharges of pollutants.[34] Part Three turns to the judicial interpretation of the Act and its parameters for public participation. Courts have held that the public has a right to participate in the development of effluent limitations, enforcement provisions, and notices of intent under general permits.[35]

Part Four analyzes the Act's citizen suit provisions and what they mean with respect to public participation. Because courts have found that a statutory "diligent-prosecution" bar in the Act limits citizen participation, the bar is analyzed to determine congressional intent.[36] This analysis serves as guidance for examining the meaning of public participation in the NPDES permitting process in Part Five. Judicial precedents suggest that the failure of a permitting authority to provide an opportunity for participation in the modification of a permit may mean that the permit is invalid. Given judicial pronouncements, permittees may find it advantageous to encourage permitting authorities to comply with public participation requirements, while citizen groups may employ citizen suits to become more active in participating in permitting activities.[37]

I. CAFO Water Pollution

During the last fifty years, pastoral landscapes of animals grazing in pastures at family farms have vanished.[38] Concentrations of animals of a single species at production locations have become prevalent, creating

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[33] *See infra* Part I.

[34] *See infra* Part II.

[35] *See infra* Part III.

[36] *See infra* Part IV.

[37] *See infra* Part V.

[38] *See* Terence J. Centner, Empty Pastures: Confined Animals and the Transformation of the Rural Landscape 1–25 (2004).

manure disposal problems.[39] When many large farms are located in a single region, manure volume may become excessive.[40] Watersheds are being polluted by nitrogen and phosphorus from the large amounts of animal manure that are applied to fields.[41] Given negative externalities associated with polluted waters, parties are filing lawsuits against animal producers and firms associated with animal production.[42]

Under the CWA, large animal farms are labeled as CAFOs.[43] The EPA has enacted a CAFO Rule that defines CAFOs based on the number of animals of a given species at a location.[44] Three subcategories of CAFOs are distinguished in the rule: Large, Medium, and Small.[45] CAFOs that discharge pollutants into waters of the United States are required to secure NPDES permits.[46] Most CAFOs with NPDES permits are Medium and Large CAFOs consisting of the following numbers of animals:

200 or more dairy cows;

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[39] Marc Ribaudo et al., U.S. Dep't of Agric., Agric. Econ. Rep. No. 824, Manure Management for Water Quality: Costs to Animal Feeding Operations of Applying Manure Nutrients to Land 1 (2003). One study showed that "[o]nly 18 percent of large hog farms and 23 percent of large dairies are currently applying manure on enough land to meet a nitrogen standard." *Id.* at 83. For purposes of this Article, manure will refer to manure, litter, or process wastewater, since the CAFO Rule applies to these forms of waste accompanying animal production. 40 C.F.R. § 122.23(a) (2010).

[40] *See* David A. Fahrenthold, *Rising with a Bullet Among Top Pollutants: Number Two*, Wash. Post, Mar. 1, 2010, at A1 (noting the irony that a natural product like nitrogen should be a major pollutant). *See generally* Noel Gollehon et al., U.S. Dept. of Agric., Agric. Bull. No. 771, Confined Animal Production and Manure Nutrients, at iii–2 (2001) (analyzing applications of manure at agronomic rates to show excess nutrients in some counties).

[41] *See* First Amended Complaint at ¶¶ 74–75, Oklahoma v. Tyson Foods, Inc., No. 4:05-cv-00329 (N.D. Okla. Aug. 19, 2005) [hereinafter Tyson Complaint].

[42] *See* Oklahoma v. Tyson Foods, Inc., 565 F.3d 769, 773 (10th Cir. 2009) (requesting the injunction of application of poultry litter on fields in a watershed); Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943, 953–54 (9th Cir. 2002) (challenging the overapplication and misapplication of manure to a field that led to discharges to navigable waters); Missouri *ex rel.* Nixon v. Premium Standard Farms, Inc., 100 S.W.3d 157, 158 (Mo. Ct. App. 2003) (contesting the grazing of cattle under a state corporate farming statute); Cmty. Ass'n for Restoration of the Env't v. Wash. Dep't of Ecology, 205 P.3d 950, 953–54 (Wash. Ct. App. 2009) (challenging a general permit application that would allow CAFOs to spread manure and litter on fields). *See generally* Tyson Complaint, *supra* note 41 (lawsuit against poultry integrators).

[43] *See* 40 C.F.R. § 122.23(b) (2010).

[44] *Id.*

[45] *Id.* § 122.23(b)(4), (6), (9).

[46] *See id.* § 122.23(a). Medium CAFOs need a NPDES permit if they discharge pollutants directly into waters of the United States, or pollutants originating outside the facility are discharged into waters of the United States. *Id.* § 122.23(b)(6)(ii).

> 300 or more cattle consisting of veal calves, heifers, bulls, steers, cow-calf pairs;
> 750 or more swine weighing fifty-five pounds or more;
> 3000 or more swine weighing less than fifty-five pounds; or
> 37,500 or more poultry with a non-liquid manure system.[47]

Farms with fewer animals than listed in the CAFO Rule are treated as nonpoint source polluters, and dispose of their animal waste under voluntary best management practices.[48] Under state nonpoint source pollution law, the regulation of agricultural pollution on these smaller farms has been unsuccessful.[49] Distinctions in NPDES permitting requirements exist between Medium and Large CAFOs, but the federal public participation provisions are the same.[50]

For two decades, environmental groups have sought to enhance the enforcement of the NPDES permitting programs over CAFOs.[51] A consent decree by the EPA concerning inadequate regulations to control discharges led to a court order in 1992, under which the EPA agreed to revise its effluent limitation guidelines.[52] The EPA adopted revised federal regulations governing discharges from CAFOs in 2003. Groups challenged whether the provisions complied with the public participation requirements of the CWA.[53] In drafting revised regulations for CAFOs, the EPA is in the difficult situation of attempting to comply with the CWA and judicial directives, while responding to arguments by contentious environmental and agricultural interest

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[47] *Id.* § 122.23(b)(6)(i) (prescribing minimum animal numbers for Medium CAFOs).

[48] *See* Margaret Rosso Grossman, *Agriculture and the Polluter Pays Principle: An Introduction*, 59 Okla. L. Rev. 1, 44 (2006) (noting that regulation of nonpoint source pollution remains weak).

[49] *See id.*

[50] *See* Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 503–04 (2d Cir. 2005); *see also* 40 C.F.R. §§ 25.1, 25.2, 122.1 (setting forth the suggested public participation elements for Clean Water Act programs).

[51] *See* Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943, 954 (9th Cir. 2002); Cmty. Ass'n for Restoration of the Env't v. Sid Koopman Dairy, 54 F. Supp. 2d 976, 981 (E.D. Wash. 1999); Claudia Copeland, Cong. Research Serv., RL 31851, Animal Waste and Water Quality: EPA Regulation of Concentrated Animal Feeding Operations (CAFOs) 8–9 (2010).

[52] *See generally* NRDC v. Reilly, No. 89–2980, 1991 U.S. Dist. LEXIS 5334 (D.D.C. Apr. 23, 1991), *modified sub nom.* NRDC v. Whitman No. 89–2980 (D.D.C. Jan. 31, 1992) (resulting in a consent decree that required the EPA to develop new effluent limitation guidelines for some CAFOs); *see also* 69 Fed. Reg. 22475 (Apr. 26, 2004); Michael Steeves, *The EPA's Proposed CAFO Regulations Fall Short of Ensuring the Integrity of Our Nation's Waters*, 22 J. Land Resources & Envtl. L. 367, 367–68 (2002) (noting why the EPA revised the regulations).

[53] Preamble to the 2003 CAFO Rule, *supra* note 19, at 7233–34.

groups.[54] The problem involves the failure of many waters to meet the water quality goals set by the CWA.[55] While environmental and agricultural interest groups argue about what is required by the CWA, past and current controls and practices have not removed sufficient pollutants to meet water quality objectives.[56]

Although accurate information regarding the number, size, and location of CAFOs nationwide is not available,[57] it is assumed that considerable amounts of phosphorus and nitrogen in impaired waters come from facilities producing animals.[58] Specifically, due to concentrations of animals, and the expense of hauling manure to more distant fields, manure is over-applied to the fields surrounding CAFOs, creating a nonpoint source of excess nitrogen and phosphorous.[59] A study by the United States Department of Agriculture (USDA) estimated that in 1997 more than one-half of the nation's hog farms applied too much manure to fields based on the nitrogen needs of crops being grown.[60] Estimates suggest that three-fourths of the country's largest dairy farms apply manure above amounts of nitrogen needed for crop production.[61] The study also surmised that sixty-four percent of phosphorus in hog manure exceeds amounts needed for crop production.[62]

Under the 2008 CAFO Rule, separate regulatory provisions apply to areas where animals are being produced and areas used for the land application of manure.[63] Production areas at Large CAFOs consisting of animal confinement areas, manure storage areas, raw materials stor-

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[54] *See* Copeland, *supra* note 51, at 15–21.

[55] *See* EPA, Office of Water, EPA 841-R-08-001, National Water Quality Inventory: 2004 Report to Congress 1 (2009). A recent EPA report found that forty-four percent of the nation's rivers and streams were not clean enough to support their designated uses. *Id.*

[56] *See id.* at 1–2.

[57] *See* U.S. Gov't Accountability Office, GAO-08-944, Concentrated Animal Feeding Operations: EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality from Pollutants of Concern 17 (2008) [hereinafter GAO Report]. The EPA also admitted that "it lacks information on the extent to which water pollutants are actually being discharged by CAFOs." *Id.* at 6.

[58] Ribaudo et al., *supra* note 39, at iii.

[59] *See* Krishna P. Paudel et al., *Geographic Information Systems (GIS) Based Model of Dairy Manure Transportation and Application with Environmental Quality Consideration*, 29 Waste Mgmt. 1634, 1640–41 (2009) (evaluating the economics of transporting dairy manure to suggest that it may be over-applied when it is uneconomical to haul the manure to distant fields).

[60] Ribaudo et al., *supra* note 39, at 14.

[61] *Id.* at 16, 25 (reporting for farms with more than 1000 animal units, which is equivalent to 700 dairy cows).

[62] *Id.* at 25.

[63] 40 C.F.R. § 122.23(b)(3), (8) (2010).

age areas, and waste containment areas cannot have any discharges to surface waters, although exceptions exist for storm events.[64] For land application areas under the control of a CAFO owner or operator, agricultural stormwater discharges are allowed.[65] This suggests that most pollutants from permitted CAFOs come from manure being applied to fields.[66] It also is not known how many pollutants come from non-regulated animal production operations, including production where grazing animals may defecate in surface waters.[67]

Resistance to complying with the CWA's regulatory controls to reduce water pollution is based on economics.[68] It is costly for agricultural producers to adhere to best management practices and secure NPDES permits, prompting agricultural interest groups to argue for fewer controls and more exceptions.[69] The USDA estimated in 2003 that the development of a comprehensive nutrient management plan would cost a farm more than $8100.[70] A recent study suggested that nutrient management planning for nitrogen may cost a farm a loss of profits ranging from twelve to nineteen percent.[71] It is also expensive for state permitting agencies to oversee permit applications and inspections, meaning that states may also support interpretations of the CWA

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[64] *Id.* § 122.23(b)(8) (definition of production area). Large CAFOs are not able to have any discharge from production areas. *Id.* §§ 412.12(a), 412.13(a), 412.15(a), 412.25(a), 412.31(a), 412.46(a). Rainfall events causing discharges from Large CAFOs are not precluded by the CAFO Rule if the CAFO is designed to not have runoff except from a twenty-five year, twenty-four hour rainfall event. *Id.* §§ 412.15(b), 412.25(b), 412.31(a)(1).

[65] *Id.* § 122.23(e).

[66] *See* Ribaudo et al., *supra* note 39, at 1 (discussing how land application is the predominant method for disposing of manure).

[67] Terence J. Centner et al., *Small Livestock Producers with Diffuse Water Pollutants: Adopting a Disincentive for Unacceptable Manure Application Practices*, Desalination, June 25, 2008, at 66, 67.

[68] *See* Preamble to the 2003 CAFO Rule, *supra* note 19, at 7242–50 (explaining how the EPA considered costs in the adoption of the 2003 CAFO Rule).

[69] *See* Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 504–06 (2d Cir. 2005). In the *Waterkeeper* lawsuit, agricultural interest groups were successful in challenging a duty to apply requirement introduced in the 2003 CAFO Rule that would have mandated more operators to apply for NPDES permits. *Id.* at 504–05.

[70] USDA, Natural Res. Conservation Serv., Costs Associated with Development and Implementation of Comprehensive Nutrient Management Plans (CNMP) 105 (2003) (noting that costs might vary greatly among operations).

[71] Kenneth A. Baerenklau et al., *Effects of Nutrient Restrictions on Confined Animal Facilities: Insights from a Structural-Dynamic Model*, 56 Canadian J. Agric. Econ. 219, 234 (2008) (evaluating nitrogen-based nutrient management plan costs).

that minimize regulatory oversight.[72] In addition, the lack of personnel in state permitting agencies may limit enforcement actions.[73]

During the development of the 2003 CAFO Rule, the EPA estimated that only twenty percent of CAFOs required to have permits actually had been issued one by a permitting authority.[74] With the revised provisions of the 2003 CAFO Rule, more CAFOs have applied for permits.[75] Compliance with the rule, however, may not achieve desired water quality goals. Permitted CAFOs are able to have agricultural stormwater discharges, and non-CAFOs may also contribute significant amounts of pollutants to surface waters.[76] Many larger production facilities do not have sufficient acreages for applying their animal waste so it is often over-applied on fields.[77] CAFOs with NPDES permits would be violating the terms of their permits by over-applying manure in this way; animal operations without permits would simply be failing to comply with voluntary best management practices.[78] In both cases, sanctions for over-application have been rare.[79]

Given this lack of effective enforcement, and continued nutrient contamination from animal production, citizens and environmental groups have sought to help enforce the NPDES permit requirements.[80] However, a lack of information has limited the ability of citizens to

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[72] *See* Preamble to the 2003 CAFO Rule, *supra* note 19, at 7242. In proposing the 2003 CAFO Rule, the EPA estimated that the administrative costs to federal and state governments would be $9,000,000 per year. *Id.*

[73] *See* Charles Duhigg, *Clean Water Laws Are Neglected, at a Cost in Suffering*, N.Y. Times, Sept. 13, 2009, at A1.

[74] NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for CAFOs, 66 Fed. Reg. 2960, 3080 (proposed Jan. 12, 2001) (noting that only 2500 out of an estimated 12,700 CAFOs with more than 1000 animal units obtained NPDES permits).

[75] The EPA estimated that as of March 2008, about 9000 of an estimated 19,000 Medium and Large CAFOs had permits. *EPA Targets Clean Water Act Violations at Livestock Feeding Operations*, EPA Enforcement Alert, March 2009, at 1–2.

[76] 40 C.F.R. § 412.15(b), 412.25(b), 412.31(a)(1). *See* Centner et al., *supra* note 67, at 66–67.

[77] Ribaudo et al., *supra* note 39, at 14, 31.

[78] *See* 33 U.S.C. § 1329 (2006); Ribaudo et al., *supra* note 39, at 14, 31.

[79] *See* GAO Report, *supra* note 57, at 48. The EPA admitted that it "has neither the information it needs to assess the extent to which CAFOs may be contributing to water pollution, nor the information it needs to ensure compliance with the Clean Water Act." *Id.*

[80] *See, e.g.*, Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943, 954 (9th Cir. 2002) (affirming the finding of ongoing violations of the CWA by the defendant); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1181–82 (D. Idaho 2001) (finding evidence of a possible violation of a NPDES permit); Water Keeper Alliance, Inc. v. Smithfield Foods, Inc., Nos. 4:01-CV-27-H(3), 4:01-CV-30-H(3), 2001 U.S. Dist. LEXIS 21314, at *7 (E.D.N.C. Sept. 20, 2001) (finding that failure to secure a NPDES permit is a violation of the CWA).

monitor and enforce water quality limitations.[81] Since NPDES permits set forth practices to reduce pollutant discharges, unless citizens have access to the information required in these permits, they cannot effectively help enforce limitations against polluters who are violating the CWA.[82] The EPA and state permitting authorities have not been diligent in enacting regulations that mandate public participation, so environmental groups have had to resort to litigation to enforce public participation opportunities mandated by the congressional dictates of the CWA.[83]

II. Public Participation Under the CWA

An analysis of the CWA's requirements for public participation starts with the text of section 101. The Act is intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[84] To achieve this goal, the CWA precludes discharges of pollutants from point sources into navigable waters, unless the point source discharger has obtained a NPDES permit.[85] Through the NPDES permit program, the Act reduces the amount of pollutants into the waters of the United States to improve water quality.[86] Simultaneously, the NPDES program transforms the Act's provisions into specific obligations for pollutant discharges.[87] Owners and operators of point sources can only discharge the specific types and amounts of pollutants authorized by a permit.[88]

Permits under the NPDES program are either issued by EPA directly, or by states that have been authorized by the EPA to implement

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[81] *See* Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 503–04 (2d Cir. 2005).

[82] *See id.*

[83] *See id.* (finding the EPA had deprived the public of an opportunity to participate guaranteed by the CWA); Sierra Club Mackinac Chapter v. Dep't Envtl. Quality, 747 N.W.2d 321, 333 (Mich. Ct. App. 2008) (finding that Michigan's regulations did not satisfy the CWA's citizen participation requirements).

[84] 33 U.S.C. § 1251(a) (2006); *see also* S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370, 385 (2006) (considering the need of a NPDES permit for discharges related to the impoundment of water for the production of hydroelectricity); S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 102 (2004) (considering the need of a NPDES permit for discharges from a pump station).

[85] 33 U.S.C. §§ 1311, 1342.

[86] *See id.* § 1251(a)–(c).

[87] *See* Ohio Valley Envtl. Coal., Inc., v. Apogee Coal Co., 555 F. Supp. 2d 640, 642 (S.D. W. Va. 2008) (considering a breach of obligations under a NPDES permit).

[88] 33 U.S.C. §§ 1311, 1342.

and administer the federal NPDES provisions.[89] EPA issues permits directly in only a few unauthorized states and Indian Country.[90] Most NPDES permits are issued by state permitting authorities,[91] and in some instances, states have authority over certain categories of discharges and no authority for others.[92]

With the NPDES permitting system serving as the mechanism to oversee point source pollution, Congress recognized the public's need to have relevant information on discharge sources and control requirements.[93] The Act's congressional declaration of goals and policy states:

> Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.[94]

With this pronouncement, it is clear that agencies need to provide the public a genuine opportunity to be heard when taking action to protect waters.[95] Given necessary information, the public can assist in the enforcement of the Act's provisions.[96] Section 402 of the Act requires the EPA and state permitting authorities to provide an opportunity for the public to participate prior to issuing a permit.[97] However, the Act does not itself specify mechanisms for public participation in

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[89] *State Program Status*, EPA, http://cfpub.epa.gov/npdes/statestats.cfm (last updated Apr. 14, 2003).

[90] *NPDES Authorization Status for EPA's Stormwater Construction and Industrial Programs*, EPA, http://cfpub.epa.gov/npdes/stormwater/authorizationstatus.cfm (last updated Feb. 26, 2009).

[91] *See id.* The EPA issues all NPDES permits in the District of Columbia, Massachusetts, Idaho, New Hampshire, New Mexico, and U.S. territorial possessions. *Id.* Every other state has primary permitting authority. *Id.*

[92] EPA issues NPDES permits for some specific discharges in Oklahoma and Texas, for example for discharges relating to oil and gas drilling. *See id.*

[93] *See* S. Rep. No. 92-414, at 3668–77 (1971).

[94] 33 U.S.C. § 1251(e) (2006).

[95] *See* Costle v. Pac. Legal Found., 445 U.S. 198, 216 (1980) (highlighting the policy of encouraging public participation in the administration of the NPDES permit program).

[96] *See* Jennifer L. Seidenberg, Note, Texas Independent Producers & Royalty Owners Ass'n v. Environmental Protection Agency: *Redefining the Role of Public Participation in the Clean Water Act*, 33 Ecology L.Q. 699, 719 (2007) (arguing that "public interest groups have shouldered much of the burden" for enforcing the CWA's provisions).

[97] 33 U.S.C. § 1342(a)(1), (b)(3).

the development and approval of NPDES permits. Rather, regulations developed by the EPA specify how the public is to be provided opportunities to be heard.[98]

For many permits issued under the authority of the CWA, general participation regulations apply. General participation regulations require agencies to: share information with the public;[99] delineate requirements for public hearings;[100] follow protocol when holding public hearings;[101] acknowledge advisory groups, and recommend involvement of groups in public participation;[102] prepare summaries identifying participation activities;[103] delineate procedures for permit enforcement and the investigation of alleged violations;[104] and require public participation in rulemaking.[105]

However, the general participation requirements do not apply to the NPDES permitting program.[106] Instead, EPA promulgated specialized participation provisions for NPDES permits in part 122:

> These provisions also establish the requirements for public participation in EPA and State permit issuance and enforcement and related variance proceedings, and in the approval of State NPDES programs. These provisions carry out the purposes of the public participation requirements of part 25 of this chapter, and supersede the requirements of that part as they apply to actions covered under this part and parts 123, and 124 of this chapter.[107]

In addition, more specific permitting directives regarding public participation exist for selected categories of NPDES permits.[108] The various federal regulations show a variety of public participation require-

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[98] 40 C.F.R. §§ 122.1(a)(3), 122.23(h), 124.10 (2010) (noting special public participation provisions for NPDES permits, public notice for notices of intent, and public notice of draft permits); *see also* Catherine Mongeon, Note, Environmental Conservation Organization v. City of Dallas *Creates Unnecessary Burdens for Citizen Suits Under the Clean Water Act*, 36 Ecology L.Q. 237, 239–43 (2009) (examining the role and framework for citizen suits under the CWA).

[99] 40 C.F.R. § 25.4.

[100] *Id.* § 25.5.

[101] *Id.* § 25.6.

[102] *Id.* § 25.7.

[103] *Id.* § 25.8.

[104] *Id.* § 25.9.

[105] 40 C.F.R. § 25.10.

[106] *See id.* § 122.1.

[107] *Id.* § 122.1(a)(3).

[108] *See, e.g.*, *id.* § 122.34(b)(2) (public participation recommendations for municipal separate storm sewer systems).

ments that permitting authorities must follow in issuing different types of permits. Given the incompleteness of statutory and regulatory public participation requirements, courts have been asked to decide whether regulatory authorities have provided adequate participation in various stages of the permitting process.

III. Judicial Interpretations of Public Participation in NPDES Permits

Permitting authorities and environmental groups have not always agreed on the meaning of public participation requirements with respect to the NPDES program. Disagreements about regulating pollution from CAFOs have presented courts with questions regarding the adequacy of public participation requirements.[109] In *Waterkeeper Alliance, Inc. v. United States EPA*, the Second Circuit found provisions of the 2003 CAFO Rule failed to provide meaningful public participation in the development of nutrient management plans required in NPDES permits.[110] In *Sierra Club Mackinac Chapter v. Department of Environmental Quality*, the Michigan Court of Appeals found Michigan's provisions for discharging under a general permit failed to provide the public an opportunity to be heard as mandated by federal law.[111]

Given these decisions, permitting authorities in other states may be confronted with challenges about the adequacy of their permitting provisions regarding public participation.[112] The judiciary has considered three aspects of public participation in the permitting process: (1) the development and revision of effluent limitations; (2) the enforcement of participation requirements through citizen suits; and (3) special problems with notices of intent under general permits.

A. *Development and Revision of Effluent Limitations*

The CWA allows the discharge of limited pollutants under NPDES permits, which establish effluent limitations that reduce pollutant dis-

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[109] *See* Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 497 (2d Cir. 2005); Sierra Club Mackinac Chapter v. Dep't of Envtl. Quality, 747 N.W.2d 321, 333 (Mich. Ct. App. 2008).

[110] 399 F.3d at 503.

[111] 747 N.W.2d at 333.

[112] *See* Danielle J. Diamond, *Illinois' Failure to Regulate Concentrated Animal Feeding Operations in Accordance with the Federal Clean Water Act*, 11 Drake J. Agric. L. 185, 189, 192–93 (2006) (concluding that Illinois' permitting scheme violated the CWA's public participation requirements, and advocating for the use of citizen suits to correct violations).

charges through the adoption of technology.[113] Distinct NPDES permitting provisions exist for CAFOs, concentrated aquatic animal production facilities, aquaculture projects, stormwater discharges, and silviculture.[114] However, a set of generalized public participation provisions apply to permits for all these sources.[115] Some permitting authorities opted to reduce administrative burdens imposed by public participation through shortcuts or informal action.[116] In other situations, the permitting authorities did not require permit applicants to submit all documentation showing how pollution would be minimized.[117] Without appropriate documentation, permittees could set their own standards, which is contrary to principles delineated in the CWA.[118] Furthermore, without adequate dialogue, the public may not express its views, and the permitting process may favor dischargers over environmental quality.[119]

Environmental groups challenged the 2003 CAFO Rule in *Waterkeeper*, arguing that the rule deprived the public of the opportunity to participate in the permitting process,[120] because it did not require CAFO nutrient management plans to be included in permit applica-

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[113] 33 U.S.C. §§ 1251(e), 1311(e), 1342(a) (2006).

[114] 40 C.F.R. § 122.23–.27 (2010).

[115] *Id.* § 122.1(a)(3).

[116] *See, e.g.*, *Sierra Club Mackinac Chapter*, 747 N.W.2d at 327–28 (arguing that the approval of a general permit without specifics of how pollutants will be minimized was adequate opportunity for the public to be heard).

[117] Michigan Dep't Envtl. Quality, National Pollutant Discharge Elimination System General Permit, MIG019000, at Part IA.4 (2005) (allowing for certificates of coverage to be issued without review of nutrient management particulars), *available at* http://www.deq.state.mi.us/documents/deq-water-npdes-generalpermit-MIG019000.pdf (last visited Feb. 15, 2011).

[118] *Waterkeeper*, 399 F.3d at 498 (observing that the failure to meaningfully review nutrient management plans allows permittees to self-regulate); Envtl. Def. Ctr. v. EPA, 344 F.3d 832, 854 (9th Cir. 2003) (observing that unreviewed documentation created "an impermissible self-regulatory system").

[119] *See* Spyke, *supra* note 7, at 298 (arguing that public participation earlier in the development of laws and rules is needed "to avoid capture by industry"); Reid Mullen, Note, *Statutory Complexity Disguises Agency Capture in* Citizens Coal Council v. EPA, 34 Ecology L.Q. 927, 931–32 (2007) (noting concern of pro-industry regulations); Marirose J. Pratt, Comment, *The Citizen Submission Process of the NAAEC: Filling the Gap in Judicial Review of Federal Agency Failures to Enforce Environmental Laws*, 20 Emory Int'l L. Rev. 741, 747 (2006) (noting the importance of preventing agency capture).

[120] *Waterkeeper*, 399 F.3d at 503–04; *see also* John C. Becker, Waterkeeper Alliance, Inc. v. EPA: *Why It Is Important*, 36 Envtl. L. Rptr. 10,566, 10,570 (2006) (discussing public participation as enunciated by the *Waterkeeper* decision); Terence J. Centner, *Clarifying NPDES Requirements for Concentrated Animal Feeding Operations*, 14 Penn St. Envtl. L. Rev. 361, 371 (2006) (discussing public participation pronouncements of the *Waterkeeper* court); Sato, *supra* note 12, at 43 (advocating public participation as an enforcement tool to ensure compliance).

tions.[121] The question before the court was whether permit applications without plans for managing nutrient pollutants allowed meaningful public input to the development of effluent limitations. To answer the petitioners' question, the court looked at the statutory provisions on public participation.[122] Section 101 of the CWA requires permitting authorities to facilitate public participation in the development and revision of effluent limitations contained in permit applications.[123] Effluent limitations are prescribed by nutrient management plans developed by permit applicants. By failing to require the terms of nutrient management plans to be submitted as part of the NPDES permitting process, the public would not have access to information on effluent limitations.[124]

Indeed, the court noted that by shielding nutrient management plans from public scrutiny, the CAFO Rule forestalled rather than encouraged public participation.[125] This led the *Waterkeeper* court to find that the 2003 CAFO Rule violated the plain dictates of section 101.[126] The court found that CAFO applicants for NPDES permits must submit nutrient management plans to permitting authorities, and the public has the right to participate in the development of effluent limitations with respect to all NPDES permits.[127] Furthermore, by failing to provide for permitting authority review of the nutrient management plans, the rule was found to be arbitrary and capricious in violation of the Administrative Procedure Act.[128] While the court's decision only applies to the permitting process for CAFOs, its reasoning provides substantial weight for concluding that analogous requirements apply to other NPDES permits.[129]

A similar result followed in the *Sierra Club* case, which concerned the approval of discharges under a general permit for CAFOs by means

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[121] The rule instead provided that a "copy of the CAFO's site-specific nutrient management plan must be maintained on site and made available to the Director upon request." Preamble to the 2003 CAFO Rule, *supra* note 19, at 7268.

[122] *Waterkeeper*, 399 F.3d at 503–04.

[123] 33 U.S.C. § 1251(e) (2006).

[124] *See Waterkeeper*, 399 F.3d at 503–04.

[125] *Id.* at 504.

[126] *Id.*

[127] *See id.*

[128] *Id.* at 499; *see* 5 U.S.C. § 706(2)(A) (2006).

[129] *See, e.g.*, Sierra Club Mackinac Chapter v. Dep't of Envtl. Quality, 747 N.W.2d 321, 334–35 (Mich. Ct. App. 2008) (acknowledging the *Waterkeeper* decision in concluding that the Michigan permit program did not conform with the CWA).

of issuing notices of intent.[130] Regulations adopted by the state permitting authority in Michigan required submission of nutrient management plans to the permitting authority, but did not provide for public participation in the plans' development or revision.[131] The *Sierra Club* court concluded that Michigan's general permitting regulations for CAFOs failed to satisfy the public participation requirements of the CWA.[132] The court found that the public is entitled to participate in the development of nutrient management plans that set forth dischargers' effluent limitations.[133]

The EPA adopted a new federal CAFO Rule in 2008 that responded to issues noted by the *Waterkeeper* court.[134] The 2008 CAFO Rule sets forth provisions that require public participation before permitting authorities approve permits or notices of intent. Information on how permit applicants will implement effluent limitations to meet discharge requirements must be available to the public.[135] With the *Waterkeeper* decision and the 2008 CAFO Rule, public groups should have the information they need to be more involved in administrative actions regarding the authorization of discharges through NPDES permits.

B. *Enforcement Through Citizen Suits*

The CWA and other environmental statutes include citizen suit provisions to supplement the governmental enforcement of provisions regulating pollution.[136] Citizens adversely affected by pollutants entering federal waters are able to allege violations of effluent standards required by the Act.[137] Citizens can also contest an order issued by a regulatory

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[130] *See id.* at 325–26. Under Michigan's provisions, a notice of intent was called a certificate of coverage. *Id.*

[131] *Id.* at 334.

[132] *Id.* at 334–35 (citing 33 U.S.C. § 1251(e) (2006)).

[133] *Id.*

[134] Preamble to the 2008 CAFO Rule, *supra* note 30, at 70,418.

[135] 40 C.F.R. §§ 122.23(h), 124.10 (2010) (requiring public opportunity to review nutrient management plans submitted with notices of intent and requiring public notice of draft permits).

[136] *See, e.g.*, Hallstrom v. Tillamook Cnty., 493 U.S. 20, 29 (1989) (noting that citizen suits supplement but do not supplant governmental action); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 67 (1987) (limiting citizen suits to ongoing violations); *see also* Pratt, *supra* note 119, at 746–47 (discussing the legislative objectives in providing for citizen suits).

[137] *See* Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 11 (1981) (noting Congress intended that citizens would be able to enforce water quality standards); *see also* 33 U.S.C. § 1365(a)(1) (2006).

authority if it departs from what is required by statute or regulation.[138] Furthermore, citizens may bring suit against the permitting authority for failure to perform an act or duty under the Act.[139]

Citizen suit provisions were crafted because governments had not proven to be effective at enforcing environmental controls.[140] The provisions were intended to motivate government enforcement and abatement proceedings.[141] To temper a multitude of cases in the courts, most statutes include sixty-day notice periods to allow the government to address alleged violations.[142] Furthermore, citizens are precluded from suing if the government has filed an action to require compliance and is diligently prosecuting.[143] Thus, while allowing citizen participation, the citizen suit provisions simultaneously seek to preclude multiple litigation actions.

Plaintiffs in the *Waterkeeper* case challenged the public's ability to bring citizen suits under the 2003 CAFO Rule.[144] By depriving the public of information in nutrient management plans delineating specific effluent limitations for permittees, the 2003 CAFO Rule had compromised the ability of persons to bring citizen lawsuits.[145] Without information pertaining to permittees' effluent limitations, "citizens [could not] determine whether there exist[ed] a deviation from" legal requirements.[146] "Furthermore, the absence of a public plan frustrate[d] an evaluation of governmental diligence in prosecuting violators."[147]

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[138] 33 U.S.C. § 1365(a)(1).

[139] *Id.* § 1365(a)(2).

[140] *See, e.g.*, Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens: Part One: Statutory Bars in Citizen Suit Provisions*, 28 Harv. Envtl. L. Rev. 401, 408 (2004) (noting that with the adoption of environmental statutes, Congress was not confident that federal and state authorities would fully enforce them).

[141] This conclusion comes from the Senate's consideration of a citizen suit provision in the Clean Air Act. *See* S. Rep. No. 91–1196, at 37 (1970), *reprinted in* 1 Legislative History of the Clean Air Act Amendments of 1970, at 401, 436–47 (1974).

[142] Ellen P. Chapnick, *Access to the Courts*, *in* The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks 395, 402 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008).

[143] *See* 33 U.S.C. § 1365(b)(1)(B); *see also* Proffitt v. Rohm & Haas, 850 F.2d 1007, 1011, 1015 (3d Cir. 1988) (noting the role of public participation through citizen suits in reversing summary judgment awarded to a holder of an NPDES permit).

[144] Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 503 (2d Cir. 2005); Centner, *supra* note 120, at 371–72.

[145] *Waterkeeper*, 399 F.3d at 503–04; Centner, *supra* note 120, at 372.

[146] *Waterkeeper*, 399 F.3d at 503–04. This is contrary to the public participation requirements of sections 101 and 402. 33 U.S.C. §§ 1251(e), 1342(j); Centner, *supra* note 120, at 371.

[147] Centner, *supra* note 120, at 371–72.

The *Waterkeeper* court found that the 2003 CAFO Rule had "impermissibly compromise[d] the public's ability to bring citizen-suits."[148] This involved the failure of the 2003 CAFO Rule to require permittees to submit appropriate documentation for evaluating compliance with the law.[149] *Waterkeeper* noted that Congress intended citizens to "'spur and supplement governmental enforcement actions.'"[150] Yet, citizen suits can only be successful if people have sufficient information to learn about violations.[151] This means that opportunities for securing information and participating in environmental permitting and enforcement actions are important. The court concluded that the 2003 CAFO Rule impermissibly compromised rights accorded by the citizen suit provision of the CWA.[152]

C. *Notices of Intent Under General Permits*

The third issue regarding public participation under NPDES permits involves the right of citizens to be heard in establishing discharges allowed by "notices of intent" under general permits.[153] General permits were devised to respond to administrative burdens imposed by large numbers of similar dischargers in a geographical area.[154] Industries are categorized according to similarities in discharge size and the nature of their runoff potential, and general permits are employed to allow coverage of multiple facilities.[155] A permitting authority adopts a general permit with an opportunity for public input, and subsequently employs notices of intent to establish effluent limitations for dischargers. Discharges are authorized when the permitting authority issues a

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[148] *Waterkeeper*, 399 F.3d 486, 503 (citing the citizen suit provision of the CWA).

[149] *See id.* at 502–03.

[150] *Id.* at 503 (quoting S. Rep. No. 99–50 (1985)).

[151] *See, e.g.*, Pamela H. Bucy, *Private Justice*, 76 S. Cal. L. Rev. 1, 42 (2002) (noting that knowledge of violations often depends on having access to reports and the physical surveillance of discharge sources).

[152] *Waterkeeper*, 399 F.3d at 503.

[153] *See* Jeffrey M. Gaba, *Generally Illegal: NPDES General Permits Under the Clean Water Act*, 31 Harv. Envtl. L. Rev. 409, 422, 465–69 (2007) (discussing the use of general permits). *See generally* EPA, Office of Wastewater Mgmt., General Permit Program Guidance (1989) (delineating regulations for permitting agencies to issue permits to large numbers of similarly-situated dischargers under a general permit and a notice of intent), *available at* http://www.epa.gov/npdes/pubs/owm0465.pdf (last visited Feb. 15, 2011).

[154] *See, e.g.*, Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 881 (9th Cir. 2003) (noting administrative burdens); *see also* Seidenberg, *supra* note 96, at 705 (discussing why the EPA adopted general permits for storm water discharges).

[155] *See* 40 C.F.R. §§ 122.28, 123.25 (2010).

notice of intent.[156] General permits have been adopted for stormwater discharges, construction activities, CAFOs, oil and gas extraction, water treatment facilities, coal mining activities, and sewage treatment facilities.[157]

Under federal NPDES provisions, some dischargers are required to reduce discharges of pollutants to the "maximum extent practicable"[158] and others must minimize nutrient movement to surface waters.[159] To meet these discharge criteria, notices of intent include site-specific particulars on how the discharger will meet these limitations.[160] Since general permits do not set forth the particulars of how pollutant discharges will be reduced to required levels, the permits do not enunciate effluent limitations.[161] Rather, effluent limitations are established in notices of intent.[162] To enable the public to participate in the establishment of effluent limitations, an opportunity for public participation is needed before the issuance of each notice of intent.[163] Any permitting program that omits an opportunity for the public to evaluate the documentation set forth in a notice of intent would make it impossible to discern whether mandated discharge requirements are being met.[164] Instead, without approval of effluent limitations, there is an impermissible self-regulatory permitting regime that does not comply with the dictates of the CWA.[165]

Courts have struggled with how to handle public participation requirements with respect to discharges authorized by notices of intent. In *Texas Independent Producers and Royalty Owners Association v. EPA*, EPA argued that since a notice of intent is not equivalent to a permit, the permitting requirements of the CWA did not apply to its issuance.[166] The Seventh Circuit concluded that because notices of intent were not

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[156] Gaba, *supra* note 153, at 411.

[157] *See id.* at 429–32; EPA, *supra* note 153, at 5.

[158] 33 U.S.C. § 1342(p)(3)(B)(iii) (2006) (for municipal storm sewers).

[159] 40 C.F.R. § 412.4(c)(2) (2010) (for Large CAFOs).

[160] *See* Gaba, *supra* note 153, at 466.

[161] *See id.* at 433. Discharges cannot be approved without documentation setting forth effluent limitations. *See* 33 U.S.C. §§ 1311, 1342 (addressing effluent limitations and requiring permits).

[162] *See* Gaba, *supra* note 153, at 466.

[163] *See* Sierra Club Mackinac Chapter v. Dep't of Envtl. Quality, 747 N.W.2d 321, 334 (Mich. Ct. App. 2008).

[164] *See, e.g.*, *id.* at 334–35.

[165] Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 498 (2d Cir. 2005) (agreeing with environmental petitioners that a self-regulatory permitting regime is impermissible).

[166] Texas Indep. Producers & Royalty Owners Ass'n v. EPA, 410 F.3d 964, 978 (7th Cir. 2005).

permits or permit applications, general permits are the document that receive regulatory approval.[167] Deferring to the EPA, the court declined to require public input before approval of notices of intent.[168] However, the Ninth Circuit viewed general permits differently in *Environmental Defense Center v. EPA*.[169] The Ninth Circuit held that notices of intent could be treated as functional equivalents of NPDES permits, and therefore availability of permit application materials and an opportunity for public participation in the permitting process applied to the issuance of notices of intent.[170]

The *Waterkeeper* and *Sierra Club* decisions suggest that the decisions in *Texas Independent Producers* and *Environmental Defense Center* are dated.[171] The CWA's public participation requirements set forth in subsection 101(e) apply not only to permit applications, but to all standards, effluent limitations, plans, and programs.[172]

The *Texas Independent Producers* decision failed to uphold the public's right to participate in developing effluent limitations as mandated by the CWA, because the court only mandated public participation at the general permit stage.[173] The public's ability to participate in the development of a general permit does not include participation in the establishment of effluent limitations because the general permit does not enumerate effluent limitations for individual dischargers.[174] Rather, notices of intent contain effluent limitations for individual applicants.[175] With respect to the *Environmental Defense Center* holding, no decision of functional equivalency is required before addressing public participation requirements.[176] Because subsection 101(e) applies to effluent limitations that are set forth in notices of intent, the public must be given an

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[167] *Id.*

[168] *Id.*

[169] Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 857 (9th Cir. 2001).

[170] *Id.* at 857–58.

[171] *Compare* Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 503–04 (2d Cir. 2005), *and* Sierra Club Mackinac Chapter v. Dep't of Envtl. Quality, 747 N.W.2d 321, 334 (Mich. App. 2008), *with Texas Indep. Producers*, 410 F.3d at 978, *and Envtl. Def. Ctr.*, 344 F.3d at 853–54.

[172] 33 U.S.C. § 1251(e) (2006).

[173] *See Texas Indep. Producers*, 410 F.3d at 978.

[174] *See id.*

[175] Under subsection 101(e), the public needs to be provided an opportunity to participate in the development of effluent limitations during the approval of a notice of intent. 33 U.S.C. § 1251(e); *see* Gaba, *supra* note 153, at 472–73 (maintaining that a minimal level of public access to notices of intent containing effluent limitations is required by the CWA).

[176] *See Envtl. Def. Ctr.*, 344 F.3d at 853–54. (addressing functional equivalency).

opportunity to participate in their development.[177] Any regulatory scheme that allows discharges from applicants without public input concerning effluent limitations is inconsistent with the public participation requirements delineated by the CWA.[178] Given subsection 101(e)'s public participation requirement for effluent limitations, permitting authorities need to revise authorization processes that do not include public participation in the issuance of notices of intent.[179]

Public participation does not mean that the permitting authority must hold a public hearing.[180] Given the focus and objectives of general permits, public input to notices of intent might involve notification of the discharger's proposal and an opportunity to comment prior to the authorization of a discharge by the permitting authority.[181] The CWA and federal and state regulations delineate criteria to determine when public hearings are required.[182] If there is insufficient public interest in the particulars of a notice of intent, written documentation can provide a meaningful opportunity to be heard.[183]

IV. Public Participation and the Diligent-Prosecution Bar of Citizen Suits

Congress included citizen suit provisions in most major environmental statutes so that citizens could augment federal and state enforcement efforts.[184] In suits against violators, citizens may seek civil penalties or an injunction.[185] While more frequent and effective enforcement is generally recognized as the main justification for citizen suit provisions, another significant goal was citizen participation in en-

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[177] 33 U.S.C. § 1251(e).

[178] *See* Seidenberg, *supra* note 96, at 720 (observing that the broad suggestions in general permits do not allow meaningful review of substantive decisions).

[179] *See* 33 U.S.C. § 1251(e).

[180] *See id.* Under the NPDES program, an opportunity for a public hearing must be given prior to the issuance of a permit. *Id.* § 1342(a)(1).

[181] For CAFOs, regulations provide that 40 C.F.R. § 124.11–.13 delineate requirements for hearings. 40 C.F.R. § 122.23(h)(1) (2010). Interested persons may request a hearing or the regional administrator or state director may hold a hearing due to public interest or to clarify issues. *Id.* § 124.11, 124.12.

[182] 33 U.S.C. § 1251(e); *see, e.g.*, 40 C.F.R. § 124.11, 124.12 (CAFO regulations).

[183] *See* Lockett v. EPA, 319 F.3d 678, 686–87 (5th Cir. 2003) (finding a state procedure allowing public participation without a hearing may be sufficient to meet federal citizen participation requirements).

[184] *See* Chapnick, *supra* note 142, at 402; *see also* Miller, *supra* note 140, at 416–17 (noting the citizen suit provisions of major federal environmental statues).

[185] *See* Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens: Part Two: Statutory Preclusions on EPA Enforcement*, 29 Harv. Envtl. L. Rev. 1, 12 n.28, 13 (2005) (discussing these remedies).

forcement.[186] This involves the ability to be heard in administrative processes.[187] For the CWA, general citizen suit provisions are set forth in section 505.[188]

To preclude multiple lawsuits against alleged violators, Congress delineated three types of limitations in the CWA: notice of violation, delay between notice and commencement of suit, and a bar for diligent prosecution.[189] With respect to the bar for diligent prosecution, two separate limitations are delineated.[190] Subsection 505(b) bars citizen suits when the Administrator or state has commenced and is diligently prosecuting an action to require compliance.[191] The second limitation involves administrative penalty actions under subsection 309(g).[192] After facilitating the imposition of administrative penalties without compliance, subsection 309(g) precludes duplicative penalties for the same violation.[193] Paragraph (6)(A)(ii) of subsection 309(g) bars citizen suits if a state permitting authority has commenced and is diligently prosecuting a state administrative penalty action comparable to federal law.[194] If a defendant raises the diligent-prosecution bar, the court lacks jurisdic-

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[186] Miller, *supra* note 140, at 420 (discussing the legislative history of citizen suits).

[187] *See id.*

[188] 33 U.S.C. § 1365 (2006).

[189] Under the CWA, no action can be commenced prior to sixty days after notice was given to the EPA, the violator, and the appropriate state. *Id.* § 1365(b)(1).

[190] *Id.* §§ 1319 (g)(6), 1365(b)(1)(B).

[191] *Id.* § 1365(b)(1)(B).

[192] *Id.* § 1319(g)(6).

[193] *Id.*; *see* Ark. Wildlife Fed'n v. ICI Americas, Inc., 29 F.3d 376, 381 (8th Cir. 1994) (maintaining that the precise public participation provisions found in the CWA are not required but rather that the "overall regulatory scheme" needs to afford significant citizen participation); N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate, 949 F.2d 552, 556 (1st Cir. 1991) (maintaining that if corrective action is taken and diligently pursued, duplicative citizen actions are not needed).

[194] Specifically, the limitation concerning a comparable state action reads:

> (6) Effect of order.
>
> (A) Limitation on actions under other sections. Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation . . . (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection . . . shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

33 U.S.C. § 1319(g)(6)(A)(ii); *see also* McAbee v. City of Fort Payne, 318 F.3d 1248, 1256 (11th Cir. 2003) (finding state law not to be comparable to the administrative penalties of § 1319(g)); Citizens for a Better Env't-Cal. v. Union Oil Co. of Cal., 83 F.3d 1111, 1118 (9th Cir. 1996) (finding action under state law was not comparable); *Scituate*, 949 F.2d at 555 (noting that the citizen suit claim vanishes if the state is prosecuting diligently).

tion if it finds that the "state has commenced and is diligently prosecuting the same violations under a state law 'comparable' to subsection [309(g)]."[195]

Defendants to CWA citizen suit actions have claimed that various state administrative actions preclude citizen suit enforcement due to the diligent-prosecution bar of subsection 309(g)(6)(A)(ii).[196] Differences over what constitutes a comparable state action mean that the comparability requirement is a disputatious issue.[197] Early cases in the First and Eighth Circuits looked to the state's total statutory enforcement scheme to apply an "overall comparability" test[198] that gave considerable deference to the state's enforcement efforts.[199] In *North and South Rivers Watershed Association v. Town of Scituate*, the First Circuit established major parameters for evaluating comparability for precluding citizen action due to diligent prosecution by a state regulatory authority.[200]

Three years later, the Eighth Circuit explained that under the rationale of the *Scituate* court, the public only needed "a meaningful opportunity to participate at significant stages of the decision-making pro-

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[195] Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co., 428 F.3d 1285, 1288 (10th Cir. 2005) (quoting 33 U.S.C. § 1319(g)(6)(A)(ii)) (noting that federal courts have no jurisdiction under the CWA over cases where states are diligently prosecuting state claims comparable to federal violations); Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist., 382 F.3d. 743, 751–52 (7th Cir. 2004) (analyzing subject matter jurisdiction under section 1319(g) of the CWA); *ICI Americas*, 29 F.3d at 378–82 (analyzing the jurisdictional bar of section 1319(g)(6)(A)).

[196] *See* Miller, *supra* note 185, at 30–33 (providing a detailed examination of the use of state action to preclude citizen suits).

[197] *See Cont'l Carbon*, 428 F.3d at 1293–94 (noting that the Tenth Circuit had never analyzed appropriate factors for determining comparability but other circuits employed different standards). *See generally* Lisa Donovan, Note, *Power to the People: The Tenth Circuit and the Right of Citizens to Sue for Equitable Relief Under Section 309(g)(6)(A) of the Clean Water Act*, 34 B.C. Envtl. Aff. L. Rev. 143 (2007) (discussing the diligent-prosecution bar of section 1319(g) to advocate for a broader role in citizen participation).

[198] *See Cont'l Carbon*, 428 F.3d at 1294 (noting the Eighth Circuit's "overall comparability' standard" in *ICI Americas*); *McAbee*, 318 F.3d at 1255 (noting the rationale of the overall comparability test used by the *Scituate* court).

[199] *See ICI Americas*, 29 F.3d at 381 (maintaining that the precise public participation provisions found in the CWA are not required but rather that the "overall regulatory scheme" needs to afford significant citizen participation); N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate, 949 F.2d 552, 556 (1st Cir. 1991) (maintaining that if corrective action has been taken and was diligently pursued, then duplicative citizen actions are not needed).

[200] *Scituate*, 949 F.2d at 555–58; *see also* Miller, *supra* note 185, at 39 (examining the shortcomings of *Scituate*); Kirstin Etela, Sixteenth Annual Pace National Environmental Law: Moot Court Competition, *Judges' Bench Memorandum*, 21 Pace Envtl. L. Rev. 355, 406–09 (2004) (identifying flaws with the *Scituate* decision because the court ignored the plain language of the statute and the legislative history of subsection 1319(g)).

cess" under state law to satisfy comparability.[201] In *Arkansas Wildlife Federation v. ICI Americas, Inc.*, the Eighth Circuit decided that states were afforded latitude in selecting enforcement mechanisms under subsection 309(g).[202] Without acknowledging subsection 101(e) of the CWA, which encourages public participation in the enforcement of regulations,[203] the court opined that comparable public participation involved "significant citizen participation."[204] Although the state scheme omitted the same public notice and comment provisions as those found in subsection 309(g), the court found that the scheme was comparable to the Federal Act.[205] The *Scituate* and *ICI Americas* cases established precedents that circumscribed citizens' ability to maintain enforcement actions against alleged violators of the CWA.[206]

In *Jones v. City of Lakeland*, the Sixth Circuit evaluated the enforcement provisions of the Tennessee Water Quality Control Act to determine whether citizens had a "meaningful opportunity to participate" in enforcement actions comparable to what is provided under federal law.[207] The court did not enunciate any comparability test but rather looked at whether the overall state regulatory scheme afforded citizens a meaningful opportunity to be heard.[208] Under Tennessee's statutory scheme, citizens could invoke administrative relief under Tennessee law in situations where the Tennessee Water Quality Control Board had entered and filed a consent agreement.[209] Given the limited access for public participation, Tennessee's provisions were not comparable to federal law and the diligent-prosecution bar of subsection 309(g)(6)(A)(ii) did not preclude a citizen suit against the city.[210]

Subsequent judicial opinions have found that the overall comparability test establishes a nebulous standard that provides little guidance

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[201] *ICI Americas*, 29 F.3d at 381 (citing *Scituate*, 949 F.2d at 556 n.7). Some form of the overall comparability test has been adopted by the First, Fifth, Sixth, and Eighth Circuits. Sierra Club v. Powellton Coal Co., 662 F. Supp. 2d 514, 527 (S.D. W. Va. 2009), *modified by*, No. 2:08–1363, 2010 U.S. Dist. LEXIS 9217, at *43 (S.D. W. Va. Feb. 3, 2010).

[202] *See ICI Americas*, 29 F.3d at 380–81 (finding that regulatory authorities are entitled to appropriate deference in their enforcement efforts).

[203] 33 U.S.C. § 1251(e) (2006).

[204] *See ICI Americas*, 29 F.3d at 381.

[205] *See id.* at 381–82.

[206] *See ICI Americas*, 29 F.3d at 381–83; N. & S. Rivers Watershed Ass'n v. Town of Scituate, 949 F.2d 552, 557–58 (1st Cir. 1991).

[207] 224 F.3d 518, 523 (6th Cir. 2000).

[208] *See id.* The dissent cited *Scituate* to conclude that the state federal provisions were comparable. *Id.* at 526 (Norris, J., dissenting).

[209] *See id.* at 523–24.

[210] *Id.* at 524 (finding that the plaintiffs' complaint set forth a cognizable claim for which relief could be granted).

for determining whether a citizen action is comparable to a state's action.[211] In analyzing the language of subsection 309(g), including components set forth in other paragraphs of the subsection, courts rejected the overall comparability test in favor of a "rough comparability" approach.[212] Subsection 309(g) says that the limitation against citizen suits applied to actions "to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection."[213] Whereas a few courts looked at comparable penalty provisions, the Ninth, Tenth, and Eleventh Circuits examined subsection 309(g) as a whole to discern three sets of procedures that need to be comparable: penalty assessment, public participation, and judicial review procedures.[214]

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[211] *See, e.g.*, McAbee v. City of Fort Payne, 318 F.3d 1248, 1255 (11th Cir. 2003); Sierra Club v. Powellton Coal Co., 662 F. Supp. 2d 514, 527 (S.D. W. Va. 2009).

[212] *See, e.g.*, Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co., 428 F.3d 1285, 1300 (10th Cir. 2005) (rejecting the interpretation of subsection 309(g) reached by the *Scituate* court); *McAbee*, 318 F.3d at 1255–56 (noting the legislative history supports rough comparability); Citizens for a Better Env't-Cal. v. Union Oil Co., 83 F.3d 1111, 1118 (9th Cir. 1996) (disagreeing with *Scituate* based on the language of the CWA, and stating that state actions should not "be given broader preclusive effect than the administrative actions of the EPA"); Wash. Pub. Interest Research Grp. v. Pendleton Woolen Mills, 11 F.3d 883, 885 (9th Cir. 1993) (observing that there was no legislative history demonstrating a congressional desire to bar more than duplicative administrative penalties); Pennenvironment v. RRI Energy Ne. Mgmt. Co., No. 07–475, 2009 U.S. Dist. LEXIS 118955, at *12–13 (W.D. Pa. Dec. 22, 2009) (noting that the legislative history supported a conclusion that the diligent-prosecution bar only applies to duplicative penalties); *Powellton Coal Co.*, 662 F. Supp. 2d at 527 (citing legislative history to support rough comparability between each class of provisions); Old Timer, Inc. v. Blackhawk-Cent. City Sanitation Dist., 51 F. Supp. 2d 1109 (D. Colo. 1999) (noting that the legislative history supports the conclusion that subsection 309(g) was not "to preclude citizen suits . . . when an administrative penalty proceeding has not yet been commenced"); L.E.A.D. Grp. of Berks v. Exide Corp., No. 96–3030, 1999 U.S. Dist. LEXIS 2672, at *97 (E.D. Pa. Feb. 19, 1999) (observing the legislative history and its intent to preclude "dual enforcement actions or penalties for the same violation"); Molokai Chamber of Commerce v. Kukui (Molokai), Inc., 891 F. Supp. 1389, 1403 (D. Haw. 1995) (noting Congress only intended the bar on citizen suits to apply to administrative penalty actions under subsection 309(g)); Save Our Bays & Beaches v. City & Cnty. of Honolulu, 904 F. Supp. 1098, 1132 (D. Haw. 1994) (stating that subsection 309(g) bars citizen suits only if state law "'provide[s] for a right to hearing and for public notice and participation procedures similar to those set forth in section 309(g)'" (quoting 1133 Cong. Rec. S737 (daily ed., Jan. 14, 1987) (statement of Sen, Chafee))).

[213] 33 U.S.C. § 1319(g)(6)(A)(ii) (2006).

[214] *See Cont'l Carbon*, 428 F.3d at 1294 (focusing on the three categories of provisions in subsection 309(g)); *McAbee*, 318 F.3d at 1254–56 (declining to adopt the standard enunciated by the *Scituate* court and focusing on three classes of provisions); *Citizens for a Better Env't*, 83 F.3d at 1115–18 (looking at the comparability of penalty provisions and their assessment).

The Eleventh Circuit's decision in *McAbee v. City of Fort Payne* illustrates the approach of these circuit courts.[215] In rejecting the overall comparability test employed by the *Scituate* and *ICI Americas* courts, the Eleventh Circuit observed that the test involved weighing incommensurable values and created uncertainty.[216] Instead, the *McAbee* court employed a rough comparability standard for determining whether the citizen suit was precluded by state action.[217] The court examined the state's public participation provisions with those in subsection 309(g)(4) and found they were not comparable.[218] Because the state did not offer comparable opportunities for the public to participate in administrative enforcement penalties, the diligent-prosecution bar provided by subsection 309(g) did not preclude the citizen suit.[219]

A rough comparability interpretation of subsection 309(g) makes it easier for plaintiffs to qualify for jurisdiction in a citizen suit.[220] Citizen suits are only precluded if the defendant establishes rough comparability between each set of state procedures and federal law.[221] Courts that ignore one or more of these components in finding a state action to be comparable to subsection 309(g) disregard the statutory scheme established by Congress.[222] The plain meaning of subsection 309(g) is that comparable state actions must involve similar penalties, participation opportunities, and opportunities for judicial review.[223]

While federal circuit courts have reached conflicting interpretations on when subsection 309(g)(6) bars jurisdiction of a citizen suit, courts tend to agree that a state action is not comparable if there was no opportunity for the public to participate in a significant stage.[224] A

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[215] *See* 318 F.3d at 1254–56.

[216] *Id.* at 1255.

[217] *See id.* at 1255–56. The court felt that § 309(g)(6)(A) required each class of state-law provisions to be roughly comparable due to comments by its principal author and sponsor. *Id.*

[218] *Id.* at 1256–57.

[219] *Id.* at 1257.

[220] *See, e.g.*, Citizens for a Better Env't-Cal. v. Union Oil Co., 83 F.3d 1111, 1118 (9th Cir. 1996).

[221] *See* Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co., 428 F.3d 1285, 1293–94 (10th Cir. 2005) (supporting the rough comparability standard).

[222] *See McAbee*, 318 F.3d at 1255–56 (noting that "legislative history supports requiring rough comparability between each class of provisions.").

[223] *See generally* Miller, *supra* note 185, at 21–30 (evaluating the plain meaning of subsection 309(g)).

[224] *See McAbee*, 318 F.3d at 1257 (finding state public participation provisions to not be comparable to the participation afforded by the CWA); Jones v. City of Lakeland, 224 F.3d 518, 524 (6th Cir. 2000) (finding a state action was not comparable because the public lacked "a meaningful opportunity to participate at significant stages of the administrative

majority of courts have concluded that to be comparable to subsection 309(g), the state needs to afford citizens reasonable opportunities to participate in the administrative enforcement procedure.[225] Courts have recognized that Congress intended that citizens be active in overseeing the water quality standards of the CWA.[226]

V. Authorizing Discharges Without Public Participation

Although the diligent-prosecution bar does not address public participation in the NPDES permit approval process,[227] the judicial interpretations of the statutory provisions are instructive.[228] Subsection 309(g)(4) of the CWA delineates rights for the public before the assessment of an administrative penalty.[229] Subsection 101(e) commands that public participation shall be provided and encouraged in the development, revision, and enforcement of effluent limitations set forth in NPDES permits.[230] Both statutory provisions concern transparency: providing citizens notice of what the administering agency is doing, followed by an opportunity to participate prior to the agency's final action.[231] For the diligent-prosecution bar, state enforcement agencies must provide a meaningful opportunity for the public to participate in significant stages of administrative penalty actions.[232] Under subsection 101(e), the public must have meaningful opportunity to comment on

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decision-making process"); Ark. Wildlife Fed'n v. ICI Americas, Inc., 29 F.3d 376, 381 (8th Cir. 1994) (citing N. & S. Rivers Watershed Ass'n v. Town of Scituate, 949 F.2d 552, 556 & n.7 (1st Cir. 1991)); L.E.A.D. Grp. of Berks v. Exide Corp., 1999 U.S. Dist. LEXIS 2692, at *101 (E.D. Pa. Feb. 19, 1999) (declining to find a state action comparable to federal law because it lacked meaningful opportunity for the public to participate in the assessment of penalties).

[225] *L.E.A.D. Grp.*, 1999 U.S. Dist. LEXIS 2692, at *99 (citing *ICI Americas*, 29 F.3d at 381); Natural Res. Def. Council, Inc. v. Vygen Corp., 803 F. Supp. 97, 101 (N.D. Ohio 1992); Pub. Interest Research Grp. of N.J., Inc. v. GAF Corp., 770 F. Supp. 943, 951 (D.N.J. 1991); Atl. States Legal Found., Inc. v. Universal Tool & Stamping Co., 735 F. Supp. 1404, 1415 (N.D. Ind. 1990).

[226] *See McAbee*, 318 F.3d at 1255–56 (noting that legislative history supports a finding that state laws must provide significant public participation opportunities in order to be comparable to Section 309(g)).

[227] *See* 33 U.S.C. § 1319(g)(6) (2006).

[228] *See generally McAbee*, 318 F.3d at 1256; *Jones*, 224 F.3d at 524.

[229] *See* 33 U.S.C. § 1319(g)(4).

[230] *See id.* § 1251(e).

[231] *See id.* §§ 1251(e), 1319(g)(4)(A).

[232] *See McAbee*, 318 F.3d at 1253; *Jones*, 224 F.3d at 524; *ICI Americas*, 29 F.3d at 381; Lockett v. EPA, 176 F. Supp. 2d 628, 633 (E.D. La. 2001), *aff'd* 319 F.3d 678 (5th Cir. 2003); Citizens Legal Envtl. Action Network, Inc. v. Premium Standard Farms, Inc., No. 97-6073-CV-SJ-6, 2000 U.S. Dist. LEXIS 1990, at *60 (W.D. Mo. Feb. 23, 2000); Knee Deep Cattle Co. v. Bindana Invs. Co., 904 F. Supp. 1177, 1182 (D. Or. 1995).

proposed effluent limitations before an authorized state regulatory agency issues a permit or notice of intent allowing for the discharge of pollutants.[233]

The judicial responses to citizen suits addressing the diligent-prosecution bar show that the omission of an opportunity for public participation means the state action is not comparable.[234] When a state action is not comparable, citizens may maintain their citizen suits.[235] The lesson from these cases is that Congress intended the public to have an opportunity to participate in the imposition of administrative penalties under subsection 309(g).[236] Public participation is important; any regulatory or administrative action that forgoes providing an opportunity for citizen input may be challenged, and failure to provide an opportunity for public participation means citizen suits are possible.[237]

With respect to the NPDES permitting program, Congress was even more emphatic in providing opportunities for the public to participate: public participation in establishing effluent limitations is to be encouraged.[238] Moreover, subsection 1342(a) of the CWA also requires an opportunity for a hearing prior to issuance of an NPDES permit.[239] Any regulation or action by the EPA or state permitting authority that does not provide adequate opportunities for public participation in the development, revision, or enforcement of a permit offends the statutory requirement.[240] How should courts respond to complaints that the public was excluded from being able to participate in the development or revision of effluent limitations? Cases addressing the issue of lack of participation in proceedings involving NPDES permits may be differentiated into two groups: inadequate participation before issuing permits, and inadequate participation during purported modifications.

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[233] *See* 33 U.S.C. 1251(e); s*ee also* Ohio Valley Envtl. Coal., Inc. v. Apogee Coal Co., 555 F. Supp. 2d 640, 647 (S.D. W. Va. 2008) (concluding that failure to comply with public notification procedures meant that the agency could not modify a permit through a compliance order).

[234] *See, e.g.*, *McAbee*, 318 F.3d at 1256; *Jones*, 224 F.3d at 524.

[235] *See, e.g.*, *McAbee*, 318 F.3d at 1257.

[236] *See* Save Our Bays & Beaches v. City & Cnty. of Honolulu, 904 F. Supp. 1098, 1132 (D. Haw. 1994); *see also* 33 U.S.C. §§ 1251(e), 1319(g)(4)(A).

[237] *See, e.g.*, *McAbee*, 318 F.3d at 1256–57.

[238] 33 U.S.C. § 1251(e) (2006).

[239] *Id.* § 1342(a)(1), (b)(3).

[240] *See id.*

A. *Inadequate Participation Before Issuing Permits*

In cases involving inadequate public participation in the issuance of new permits, the most direct and effective citizen suit action is to challenge the government's action.[241] Citizens can allege the regulations fail to comport to federal participation requirements, as occurred in *Waterkeeper Alliance, Inc. v. United States EPA*, or they may allege that the regulatory authority failed to adhere to public participation requirements set forth in statutory or regulatory provisions.[242] These suits would vacate the offending provisions or request an order to secure compliance with public participation requirements.

In discussing problems with the regulation of discharges from CAFOs, citizen suits forced the EPA to revise the federal CAFO Rule.[243] Due to a citizen lawsuit commenced by the Natural Resources Defense Council in 1989, the EPA agreed to amend the CAFO Rule.[244] In the 2003 CAFO Rule, the EPA omitted a requirement under which the public would have access to information on effluent limitations in CAFO NPDES permit applications.[245] The citizen suit challenge in *Waterkeeper* led the Second Circuit to find that the 2003 CAFO Rule violated the CWA by forestalling public participation.[246] As a result of the *Waterkeeper* lawsuit, the EPA amended its regulations in 2008 to require opportunities for public input prior to the approval of discharges through notices of intent and permits.[247]

For individual NPDES permits, regulations require public notice of draft permits[248] and the 2008 CAFO Rule requires applicants to submit a nutrient management plan.[249] With the submission of nutrient management plans, the public will have an opportunity to evaluate the

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[241] *See, e.g.*, Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 524 (2d Cir. 2005).

[242] *See id.* at 524 (vacating the 2003 CAFO Rule's provisions concerning inadequate opportunity for public participation).

[243] *See generally* NRDC v. Reilly, No. 89–2980, 1991 U.S. Dist. LEXIS 5334 (D.D.C. Apr. 23, 1991), *modified sub nom.* NRDC v. Whitman No. 89–2980 (D.D.C. Jan. 31, 1992).

[244] *See id.* at 10–11.

[245] *See* Preamble to the 2003 CAFO Rule, *supra* note 19, at 7268 (providing in 40 C.F.R. § 122.42(e)(2)(ii) that nutrient management plans containing effluent limitations must be available to the director but not the public). The *Waterkeeper* court made the point that the rule only requires that copies of the nutrient management plan be made available to the director and not the public. *Waterkeeper*, 399 F.3d at 503.

[246] *Waterkeeper*, 399 F.3d at 503–04.

[247] *See* Preamble to the 2008 CAFO Rule, *supra* note 30, at 70,468, 70,480–81.

[248] 40 C.F.R. § 124.10(a) (2010).

[249] *Id.* § 122.21(i)(x) (permit applications must contain nutrient management plans).

effluent standards set forth in the applications.[250] With respect to notices of intent under general permits, each notice must include a nutrient management plan that is made available for public review.[251] Permitting authorities are required to respond to significant comments and may require revisions to submitted nutrient management plans.[252] These provisions definitively establish opportunities for public participation prior to approval of documentation allowing discharges.[253]

However, some state permitting authorities may not have adopted similar provisions.[254] State CAFO regulations that fail to allow citizen input to the development of effluent limitations should be found to be arbitrary and capricious.[255] Similarly, state permitting requirements for discharges from other sources can be challenged if they fail to provide reasonable opportunity for public input as required by subsection 101(e) of the CWA.[256] *Waterkeeper* establishes that whenever a permitting authority's regulations fail to provide an opportunity for public participation in the development or revision of a permit, citizens are able to bring a citizen suit to secure an opportunity for public input.[257]

B. *Inadequate Participation in Modifying a Permit*

Several courts have considered citizen suits addressing discharges where permitting authorities failed to provide the public an opportunity to be heard prior to the modification of permits authorizing discharges.[258] The courts' decisions suggest that agency action without pro-

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[250] *Id.* § 122.23(h). For draft permits, the public must have thirty days for commenting on the permit application. *Id.* § 124.10(b).

[251] *Id.* § 122.23(h) (owners and operators employing notices of intent under general permits must submit nutrient management plans).

[252] *Id.* (requiring the director to make notices of intent available for public review).

[253] *See* 33 U.S.C. § 1342(a)(1), (b)(3) (2006) (providing an opportunity for the public to be heard in permitting proceedings).

[254] *See* Terence J. Centner, *Discerning Public Participation Requirements Under the US Clean Water Act*, 24 Water Resources Mgmt. 2113, 2123–24 (2010).

[255] *See* Waterkeeper Alliance, Inc. v. U.S EPA, 399 F.3d 486, 503 (2d Cir. 2005).

[256] *See* 33 U.S.C. § 1251(e).

[257] *See Waterkeeper*, 399 F.3d at 503, 524.

[258] *See* United States v. Smithfield Foods, Inc., 191 F.3d 516, 524, 526 (4th Cir. 1999) (finding that orders by a state permitting authority did not modify a permit); Citizens for a Better Env't-Cal. v. Union Oil Co. of Cal., 83 F.3d, 1111, 1119–20 (9th Cir. 1996) (concluding that a cease and desist order did not modify a permit, and noting that public participation requirements apply to the permit modification process); Proffitt v. Rohm & Haas, 850 F.2d 1007, 1012 (3d Cir. 1988) (noting that substantial changes to a permit require public notice under federal regulation then in effect); Envtl. Coal. v. Apogee Coal Co., 555 F. Supp. 2d 640, 645–47 (S.D. W. Va. 2008) (finding that failure to provide public participation meant the permit had not been modified).

viding the public an opportunity to be heard is a serious problem. Responses to this problem include vacating deficient orders or finding the administrative actions to be invalid or void.[259] The attempted modifications would be ineffective in providing legal authority for discharges so that the discharge limitations of the existing, unrevised permit would apply.[260] Thus, although the permit would not contain the terms requested by the permittee to authorize discharges, the underlying original permit would address discharges.[261]

The Third, Fourth, and Ninth Circuit s have considered efforts to modify permits without public participation and offered insights on what to do when the public is denied an opportunity to participate in the establishment of effluent limitations. In *Proffit v. Rohm & Haas*, the Third Circuit considered a purported modified permit.[262] The evidence showed that substantial changes were incorporated in an amended permit without an opportunity for public participation.[263] After noting that amended permits with substantial changes required public notice of the proposed modification to inform interested and potentially interested persons of discharges, the court found that the citizen suit allegations involved violations of effluent limitations established in both the original and amended permits.[264] Therefore, the circuit court did "not decide the nice question of which permit, if any, is applicable."[265] Rather, the plaintiff had alleged a continuing violation so the trial court had erred in dismissing the suit.[266]

In *Citizens for a Better Environment-California v. Union Oil Co. of California*, the district court declined to dismiss a citizen suit's effluent

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[259] *See, e.g.*, *Citizens for a Better Env't*, 83 F.3d at 1119–20; *Proffitt*, 850 F.2d at 1012, 1014; Riverkeeper v. Mirant Lovett, 675 F. Supp. 2d 337, 345 (S.D.N.Y. 2009) (invalid); Sierra Club v. Cripple Creek & Victor Gold Mining Co., Nos. 00-cv-02325-MSK-MEH, 01-cv-02307-MSK-MEH, 2006 U.S. Dist. LEXIS 27973, at *49 (D. Colo. Apr. 13, 2006) (void).

[260] *Riverkeeper*, 675 F. Supp. 2d at 345, 346.

[261] *See id.*

[262] *See Proffitt*, 850 F.2d at 1012.

[263] *Id.*

[264] *Id.* at 1013–14. The court declared:

> We see no reason why these substantial changes are not encompassed within the regulation that required "public notice of the proposed issuance, denial or modification of every permit . . . in a manner designed to inform interested and potentially interested persons of the discharge and of the proposed determination to issue, deny, or modify a permit for the discharge."

Id. at 1013 (citing 40 C.F.R. § 125.32(a) (1975)).

[265] *Id.* at 1014.

[266] *Id.*

standards claim.[267] The defendant had maintained that a cease and desist order modified its permit compliance date to provide a defense against the action.[268] In affirming the district court, the Ninth Circuit concluded that there was no modified permit.[269] Because the permit had not been modified, the court never decided what happens when a permitting agency fails to conform with public participation requirements.[270]

The Fourth Circuit had an opportunity to consider the modification of a permit in *United States v. Smithfield Foods, Inc.*[271] The defendant argued that its permit had not been violated because orders from the state permitting authority "superseded and revised" the permit.[272] In rejecting this argument, the district court had found that because the defendant "'did not follow the procedures required for the modification of a permit, and none of the [permitting authority's] Special Orders and letters were issued in accordance with the permit modification procedures,'" the permit was not modified.[273] Affirming the district court's reasoning, the Fourth Circuit agreed that the permit had not been revised so the district court was correct in granting the plaintiff summary judgment on the issue of liability.[274]

Federal district courts have cited these three circuit court cases and have extended the reasoning to find that the absence of an opportunity for public participation may mean that an administrative action does not revise a permit. Five district court cases may be examined to discern their responses to actions intended to modify permits.

In *Ohio Valley Environmental Coalition, Inc. v. Apogee Coal Co.*, the defendant of a citizen suit claimed that a compliance order suspended the limits of a permit issued under a state-run NPDES program.[275] Given the terms of the compliance order, if it modified the permit, the permittee was in compliance with pollutant limitations and the plaintiff would have no cause of action.[276] In analyzing the allegations of permit viola-

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[267] 83 F.3d, 1111, 1113 (9th Cir. 1996).

[268] *Id.* at 1119.

[269] *Id.*

[270] *Id.* at 1119–20.

[271] 191 F.3d 516, 520 (4th Cir. 1999).

[272] *Id.* at 523.

[273] *Id.* at 524 (quoting United States v. Smithfield Foods, Inc., 965 F. Supp. 769, 787 (E.D. Va. 1997)).

[274] *Id.* at 526.

[275] 555 F. Supp. 2d 640, 645–47 (S.D.W. Va. 2008).

[276] *Id.* at 644. Plaintiffs would be estopped from bringing suit if the violations were "wholly past." *Id.*

tions, the court concluded that three circuit courts "have held that a modification to a permit will not prevent a citizen suit action on the terms of the underlying permit if that modification does not comport with proper procedure," citing *Proffit*, *Citizens for a Better Environment*, and *Smithfield Foods*.[277] Based upon these precedents, the district court held that any procedurally flawed modification "cannot change the terms of the underlying permit."[278]

A district court in New York made a number of pronouncements about modifying permits in *Riverkeeper, Inc. v. Mirant Lovett, LLC*.[279] An environmental plaintiff argued that a defendant's power station was violating the provisions of its state permit.[280] The defendant countered this allegation by claiming that a consent order signed by the state permitting authority had modified the terms of the permit so there was no violation.[281] In concluding that the consent order did not modify the permit, the *Riverkeeper* court viewed the consent order as establishing a compliance schedule that provided for deferring the enforcement of requirements set forth in the permit.[282] As a settlement for the selective non-enforcement of permit terms, the consent order did not bar citizen suits under the CWA.[283] The *Riverkeeper* court also commented that because federal law requires public participation in the revision of a permit, it was unlikely that a consent order involving a permitting authority and a defendant would offer such an opportunity.[284] In the absence of an opportunity for public input, the court felt that any modification by a consent order would be invalid.[285]

Two cases from Pennsylvania considered citizen suits with issues about whether permits had been modified. In *Profitt v. Lower Bucks County Joint Municipal Authority*, a permitting authority issued a consent order establishing interim, lower effluent limitations than were present in the

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[277] *Id.* at 645 (citing United States v. Smithfield Foods, 191 F.3d 516 (4th Cir. 1999); Citizens for a Better Env't–Cal. v. Union Oil Co. of Cal., 83 F.3d 1111 (9th Cir. 1996); Proffitt v. Rohm & Hass, 850 F.2d 1007 (3d Cir. 1988)). The court also cited its earlier decision in Ohio Valley Envtl. Coal., Inc. v. Apogee Coal Co., 531 F. Supp. 2d 747, 754–55 (S.D. W. Va. 2008). *Id.*

[278] *Apogee Coal*, 555 F. Supp. 2d at 645.

[279] 675 F. Supp. 2d 337, 345–46 (S.D.N.Y. 2009).

[280] *Id.* at 341.

[281] *Id.* at 342, 344. The consent order granted extensions for installing a system to protect marine life in the Hudson River. *Id.* at 341–42.

[282] *Id.* at 345.

[283] *Id.*

[284] *See Riverkeeper*, 675 F. Supp. 2d at 346.

[285] *Id.* at 334–34.

permit.[286] After citing the federal regulatory authority for modifying NPDES permits, the court noted that the proper steps for the modification of a permit were not followed.[287] The *Bucks County* court decided that the consent order could not modify the permit.[288] The logic of the *Bucks County* court's analysis was adopted in *Pennsylvania Public Interest Research Group v. P.H. Glatfelter Co.*[289] The *P.H. Glatfelter* court noted that if a permitting authority does not follow proper modification procedures before entering a consent agreement, the agreement does not alter the defendant's permit obligations.[290] Improper modification procedures mean that the resulting orders or permits are invalid.[291]

Other support for finding modifications to permits invalid is offered by a district court decision in *Sierra Club v. Cripple Creek & Victor Gold Mining Co.*[292] The court noted that a purported permit modification by agency letter, agency order, or stipulation without public opportunity to be heard was void as a matter of law.[293] Whether the court finds an administrative action void, invalid, or failing to alter permit obligations, the effect is that the action does not modify the underlying permit.[294] Support for not allowing permits to be modified without public input is the policy delineated in the CWA of encouraging public participation in the administration of the NPDES permit program.[295] Agencies that disregard this policy expose permittees to citizen suits.

Drawing on the reasoning adopted by courts regarding permit modifications, it might be argued that any permit issued by a regulatory authority without an opportunity for public input should be ineffective

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[286] No. 86–7220, 1987 U.S. Dist. LEXIS 11759, at *2 (E.D. Pa. Dec. 16, 1987), *rev'd on other grounds*, 877 F.2d 57, 57 (3d Cir. 1989).

[287] *Id.* at *3–6 (citing 40 C.F.R. § 123.25(a) (1985)).

[288] *Id.* at *6.

[289] 128 F. Supp. 2d 747, 759–60 (M.D. Pa. 2001) (citing *Bucks Cnty.*, 1987 U.S. Dist. LEXIS 11759, at *2).

[290] *Id.* at 759.

[291] *See id.* at 762.

[292] Nos. 00-cv-02325-MSK-MEH, 01-cv-02307-MSK-MEH, 2006 U.S. Dist. LEXIS 27973, at *48–49 (D. Colo. Apr. 13, 2006) (citing a number of other cases in support of its argument).

[293] *Id.* at *48–49.

[294] *See P.H. Glatfelter*, 128 F. Supp. 2d at 762; *In re* Catskill Mountains Chapter of Trout Unlimited v. Sheehan, No. 06–3601, 2008 N.Y. Misc. LEXIS 5923, at *18–19 (N.Y. Sup. Ct. Aug. 5, 2008) (vacating a determination about a state NPDES permit due to inadequate opportunity for public input, and ruling that the previously issued permit would remain in force for a reasonable time).

[295] *See P.H. Glatfelter*, 128 F. Supp. 2d at 759; Proffitt v. Lower Bucks Cnty. Joint Mun. Auth., 1987 U.S. Dist. LEXIS 11759, at *4 (E.D. Pa. Dec. 16, 1987) (citing Costle v. Pac. Legal Found., 445 U.S. 198, 215–16 (1980)).

in authorizing discharges. Because the CWA places participation by the public as an integral component of the NPDES permitting scheme, failure to give notice to the public and allow participation might be interpreted to mean that the permitting authority cannot issue a valid permit.[296] However, courts have not reached this result. Instead, lapses by permitting authorities not following public participation requirements are addressed by citizen suits against the agency.

Conclusion

Although Congress and state legislatures have enacted numerous laws to enhance environmental quality, many Americans continue to be adversely affected by air and water pollution. One problem is the lack of governmental response to violations of environmental laws. Governments are not able to diligently enforce environmental laws.[297] Due to a number of reasons, including inadequate budgets, Congress anticipated this problem, and countered it by including citizen suit provisions in major environmental laws that allow citizens to take up the slack and bring suits to address violations. The inclusion of a citizen suit provision in an environmental statute demonstrates congressional intent to have the public help oversee environmental quality and regulatory compliance. In addition to citizen suit provisions, many statutes require opportunities for the public to be involved with administrative permitting and penalty actions.[298]

When citizen participation is included in a statute, questions arise regarding what kinds of participation are required, what administrative actions must include opportunities for citizen input, when citizens can make input, and what kind of input may be made.[299] In analyzing the congressional directives set forth in subsection 101(e) of the CWA, it is clear that Congress intended citizens to be able to participate in the "development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program" established under the Act.[300] This

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[296] *See P.H. Glatfelter*, 128 F. Supp. 2d at 759; *Proffitt*, 1987 U.S. Dist. LEXIS 11759, at *4 (citing *Costle*, 445 U.S. at 215–16).

[297] Perhaps the greatest reason for not enforcing is economic; states are under pressure to slacken environmental requirements in order to keep jobs. *See* Will Reisinger, Trent A. Dougherty & Nolan Moser, *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?*, 20 Duke Envtl. L. & Pol'y F. 1, 19 (2010). The authors advocate for more vigorous enforcement as a solution. *Id.* at 61.

[298] *See, e.g.*, 33 U.S.C. §§ 1319(g)(4), 1342(a)(1) (2006) (delineating penalty actions and an opportunity for a hearing before issuance of CWA and NPDES permits).

[299] *See supra* Parts II–V.

[300] 33 U.S.C. § 1251(e).

means that under the CWA, citizens should be able to participate in the development of effluent limitations set forth in NPDES permits. Furthermore, if a permittee desires to modify a permit, the citizen participation provisions remain applicable.[301] Any cease and desist order, consent order, compliance order, or other document that is intended to modify a permit should only be effective if the public receives notification and is provided an opportunity to participate.[302] While these requirements for public participation may be cumbersome, participation fosters public involvement in facilitating the environmental objectives delineated by Congress in various statutes.

An analysis of judicial rulings on public participation offers two suggestions for regulators and permittees involved in the NPDES permitting process. First, permittees have an interest in helping their permitting authority follow legal directives on public participation. If a permitting authority issues permits without adequate opportunity for public input, the agency's actions may be challenged and the validity of existing permits may become an issue.[303] Permittees should want permitting authorities to follow the public participation requirements mandated by statutory and regulatory provisions to reduce the risk of being liable for unauthorized discharges.[304]

Second, Congress and the courts have noted that an opportunity for public participation is an important aspect of the issuance of permits. These pronouncements suggest that citizen groups may become even more active in enforcing environmental standards.[305] If a waterbody is polluted, an environmental group might evaluate the facts and proceedings to determine whether a citizen suit is possible. Groups can seek out the sources of pollutants, examine the effluent limitations authorized by the sources' NPDES permits, and learn whether the public had access to documentation prior to the issuance of the permits. If the public did not have input in developing the effluent limitations set forth in a permit or revised permit, a citizen suit may be possible. If a permit-

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[301] *See* Riverkeeper, Inc. v. Mirant Lovett, LLC, 675 F. Supp. 2d 337, 345 (S.D.N.Y. 2009); Sierra Club v. Cripple Creek & Victor Gold Mining Co., Nos. 00-cv-02325-MSK-MEH, 01-cv-02307-MSK-MEH, 2006 U.S. Dist. LEXIS 27973, at *48–49 (D. Colo. Apr. 13, 2006).

[302] *See supra* Part V.B.

[303] *See* Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 503 (2d Cir. 2005).

[304] *See* Ohio Valley Envtl. Coal., Inc. v. Apogee Coal Co., 555 F. Supp. 2d 640, 644 (S.D. W. Va. 2008).

[305] *See Waterkeeper*, 399 F.3d at 503 (stating that Congress "intended to guarantee the public a meaningful role in the implementation of the Clean Water Act").

tee's pollutant loadings or other significant parameters in the permit are not being followed, this may also form the basis of a citizen suit.

The statutory directives on citizen participation are demanding; any deviation from the requirements by a permittee or any noncompliance with statutory or regulatory directives by a permitting authority offers an argument that can be raised in a citizen suit. Efforts to attain environmental quality objectives show a progression of requirements, actions, and remedies. While Congress established basic controls in major environmental statutes decades ago, regulatory agencies and the public are still developing the framework and procedures to respond to pollution problems.[306] Citizen participation has been instrumental in forging environmental controls that can effectively reduce pollution and contamination problems. Recent developments suggest that citizens can be even more active in championing environmental quality. Greater citizen participation in the permitting process can enhance the efforts of permitting authorities in reducing pollutant discharges.

Moreover, disasters such as the explosion of an oil rig in the Gulf of Mexico suggest that greater citizen involvement may be needed to spur businesses and governmental authorities to do more in reducing environmental risks associated with regulated activities.[307] Canada's Prime Minister claimed that the environmental and safety standards of the United States are weaker than those of Canada, citing a rule for drilling relief wells during the same drilling season as the initial well.[308] Have governments been too lax in not updating safety requirements for offshore oil drilling?[309] The oil spill is a reminder that governmental regulations are needed to reduce the risks of environmental disasters.[310] Greater citizen involvement can help governments take actions that would reduce risks. Simultaneously, more vigilant oversight of drill-

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[306] Indeed, some advocate that greater citizen involvement is needed. *See, e.g.*, Mary Christina Wood, *Nature's Trust: Reclaiming an Environmental Discourse*, 25 VA. ENVTL. L.J. 243, 268–71 (2007); *see also* David Drelich, *Restoring the Cornerstone of the Clean Water Act*, 34 COLUM. J. ENVTL. L. 267, 329 (2009) (expressing an opinion that the CWA is stronger in responding to hazards than its advocates believe).

[307] The industry may be lagging in the development of technology to respond to disasters. *See* Steven Mufson, *Today's Spills, Yesterday's Tools*, WASH. POST, May 4, 2010, at A1.

[308] *See* Shawn McCarthy, *Harper Says Canada Should Keep Tough Drilling Rules*, GLOBE & MAIL (Toronto), May 4, 2010, at B2.

[309] *See* Michael Isikoff, Ian Yarett & Matthew Philips, *Spill, Baby, Spill*, NEWSWEEK, May 10, 2010, at 42.

[310] *See* Paul Krugman, Op-Ed., *Drilling, Disaster and Denial*, N.Y. TIMES, May 3, 2010, at A25.

ing permits may be needed to ascertain that existing offshore regulations are being followed.[311]

[311] 40 C.F.R. pt. 112 (2010) (oil spill prevention).